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NO. 91715-9

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SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES and FREEDOM FOUNDATION

Respondents.

CORRECTED RESPONSE BRIEF OF STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES TO
FREEDOM FOUNDATION'S CROSS APPEAL

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I. INTRODUCTION

Freedom Foundation's (Foundation) Cross Appeal raises two issues under the Public Records Act (PRA). The first issue is whether the trial court abused its discretion by granting Service Employees International Union 925's (SEIU 925) request for a Temporary Restraining Order (TRO). The Foundation argues that a TRO may be granted only if the movant can prove that it would be entitled to a *permanent* injunction. That argument conflates the standards and ignores the fact that a TRO, unlike a permanent injunction, is not intended to reach and resolve the merits. A TRO may be granted so long as the movant can show a *likelihood* of success and a necessity to maintain the status quo pending a ruling on the permanent injunction.

The second issue is the Foundation's request for attorney fees and costs under RAP 18.1 and RCW 42.56.550(4). The PRA authorizes attorney fees when a person prevails against an agency, but not when a third party obtains an order preventing release of records—and certainly not against an agency that was prepared to release the requested records. The Department of Social and Health Services (DSHS) would have released the records but for the order of the superior court. DSHS is still

prepared to produce the records if the TRO is lifted or if directed to do so by this Court.

II. STATEMENT OF THE CASE

DSHS relies on the Statement of the Case previously articulated in its November 4, 2015, response brief to the appeal filed by SEIU 925.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion by Ordering a TRO Pending a Hearing on a Preliminary Injunction

The Foundation argues that the trial court applied the wrong standard and abused its discretion when it issued a TRO pending the consolidated hearing on the preliminary and permanent injunction. The Foundation's argument is without merit.

The granting or withholding of an injunction is addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case. *WFSE v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983) (citing *Alderwood Assocs. v. Wash. Env'tl. Coun.*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981)). The appellate court will not disturb the trial court's exercise of discretion unless it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary. *State Ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This is a high burden, which the Foundation has not met.

There are three ways for a party to stop the release of public records: (1) a TRO under CR 65(b); (2) a preliminary injunction under CR 65(a); or (3) a permanent injunction under CR 65 and RCW 42.56.540. To obtain any of these forms of relief, a party must show (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to the moving party. *Tyler Pipe Indus., Inc. v. Dep't of Rev.*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court's power to enjoin the production of a record under the Act. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190 (2011). "Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

Although they look to the same factors, a TRO or preliminary injunction (on one hand) and a permanent injunction (on the other) serve

different purposes and demand different burdens. While a permanent injunction goes to the ultimate merits of the case, a TRO or a preliminary injunction is intended merely to preserve the status quo until the trial court can conduct a full hearing on the merits. *Ameriquest v. Att’y Gen.*, 148 Wn. App. 145, 157, 199 P.3d 468 (2009) (citing *Nw. Gas Ass’n v. Wash. Util. & Transp. Comm’n*, 141 Wn. App. 98, 115-16, 168 P.3d 443 (2007)), *aff’d on other grounds*, 170 Wn.2d 418, 241 P.3d 1245 (2010). As such, preliminary injunctive relief is available whenever the movant can show a *likelihood* that it will ultimately prevail based on the *Tyler Pipe* requirements. *Nw. Gas*, 141 Wn. App. at 116.

The Foundation posits that the initial hearing for a TRO should be subject to the same rigorous standard that is required for a permanent injunction to issue. The law does not establish such a stringent standard. Temporary and preliminary injunctions merely require a likelihood of success at hearing, and pursuant to CR 65(b), a TRO can be entered just on the plaintiff’s pleadings and affidavits. CR 65(b); *Spokane Police Guild v. Wash. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989). Contrary to the assertion by the Foundation, the Court of Appeals’ decisions in *Ameriquest* and *Nw. Gas* do not state that a court must grant a temporary injunction even when the moving party fails to prove the likelihood of prevailing on the merits. (Foundation brief at 18). In both of

those cases the parties agreed to the initial TRO. *Ameriquist*, 148 Wn. App. at 153; *Nw. Gas*, 141 Wn. App. at 109.

In this case, the court below performed a likelihood of success analysis at the TRO hearing, and ruled that SEIU 925 had made a sufficient showing to temporarily enjoin disclosure, particularly in light of the constitutional issues raised by SEIU 925. VRP (Dec. 19, 2014) at 32-33. The Foundation fails to show that the trial court overstepped its broad discretion by making this ruling.

B. Freedom Foundation Has Not Prevailed Against DSHS for the Production of Records and Is Not Entitled to Costs or Fees From DSHS

The Foundation requests payment of costs and fees pursuant to RAP 18.1 and RCW 42.56.550(4). The Foundation does not specify from *whom* it seeks costs and fees. Nevertheless, the Foundation is not entitled to receive any costs and fees from DSHS, because DSHS did not breach the PRA.

Reasonable attorney fees or expenses may be awarded only if allowed by applicable law. RAP 18.1(a). A party that requests fees or expenses must provide argument and citation to authority in order to advise the court of the appropriate grounds. *Wilson Court Ltd. P'ship v. Tony Maroni's Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) (citing *Austin v. U.S. Bank*, 73 Wn. App. 293, 313, 869 P.2d 404 (1994)).

The PRA authorizes attorney fees to a person who prevails against an agency in seeking to inspect or copy public records. RCW 42.56.550(4). The purpose of this provision is to encourage disclosure and to deter agencies from improperly denying access to records. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998). But when a record is withheld as a result of a *third party's* action, with no interference by the agency, there is no misconduct to deter and fees are not authorized against the agency. *Id.* That is exactly the case here.

Following the Foundation's request for records, DSHS timely identified and provided all responsive records except for two lists containing the names of approximately 4,500 Family Friends and Neighbors. DSHS would have released the records but for an order of the superior court and the Court of Appeals. DSHS is still prepared to produce the records if the TRO is lifted or if directed to do so by the Court. Just as in *Confederated Tribes*, DSHS has done nothing to withhold the records at issue, and assessing fees against DSHS would serve no purpose recognized by the PRA.

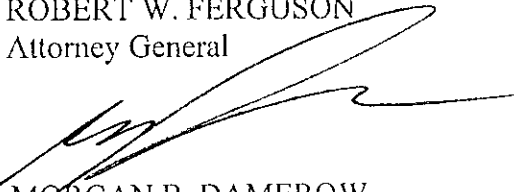
IV. CONCLUSION

The trial court applied the proper standards and properly exercised its discretion in making its TRO ruling and the Court should decline to

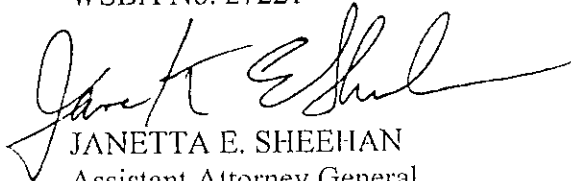
adopt the Foundation's novel tests. This Court should not assess fees and costs against DSHS, in the absence of any wrongdoing by the agency.

RESPECTFULLY SUBMITTED this 4 day of December, 2015.

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NO. 91715-9

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL
925 (SEIU 925),

Appellant,

v.

FREEDOM FOUNDATION,

Respondent/Cross Appellant,

and

WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

CERTIFICATE OF
SERVICE


I, Jane Rockwell, hereby declare under penalty of perjury under the laws of the State of Washington that on December 4, 2015, I caused the foregoing State of Washington Department of Social and Health Services Amended Response Brief to Freedom Foundation's Cross Appeal to be filed with the Washington State Supreme Court, via email to supreme@courts.wa.gov and per e-mail per agreement of counsel, to the following:

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Appeal

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Good afternoon,

The Respondent, DSHS, respectfully requests the Court to disregard the filing attached with the email sent at 4:12 pm and accept in its place this one, changed to correct one error.

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Best Regards,

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Subject: NO. 91715-9 Respondent DSHS's Response Brief to Freedom Foundation's Cross Appeal

Good afternoon,

Please find attached for filing today in Case No. 91715-9 Washington State Department of Social and Health Services Response Brief to Freedom Foundation's Cross Appeal and Certificate of Service for same.

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Best Regards,

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